



CASE CLIPS

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CRIMINAL LAW ISSUE

CHERRY v. STATE, No. 48A04-0109-CR-417, ___ N.E.2d ___ (Ind. Ct. App. July 10, 2002).
BROOK, C. J.

Cherry contends that the trial court's \$211,050.00 restitution order is an abuse of discretion. He argues that a trial court is not authorized to include pre-sentence interest in a restitution order

.
Indiana Code Section 35-50-5-3 governs restitution orders and provides in relevant part that

[t]he court may order the person convicted of an offense under IC 35-43-9 [e.g., theft] to make restitution to the victim of the crime. The court shall base its restitution order upon a consideration of the amount of money that the convicted person converted, misappropriated, or received, or for which the convicted person conspired.

. . .

.
Because restitution is penal in nature, the restitution statute must be strictly construed against the State to avoid enlarging [it] by intendment or implication beyond the fair meaning of the language used." *State v. Shelton*, 692 N.E.2d 947, 949 (Ind. Ct. App. 1998). Because Indiana Code Section 35-50-5-3 does not specifically authorize a trial court to include pre-sentence interest in a restitution order, we conclude that a trial court may not do so.

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FRIEDLANDER and SHARPNACK, JJ., concurred.

CIVIL LAW ISSUE

BRINKMAN v. BRINKMAN, No. 55A01-0109-CV-352, ___ N.E.2d ___ (Ind. Ct. App. July 10, 2002).

RATLIFF, Senior Judge

[T]he trial court approved the Brinkmanns' agreement which was orally presented to the court on October 10, 1995, and then submitted in written form as the decree. . . .

[C]urtis made payments to Cynthia pursuant to the decree. Further, Curtis and Cynthia began seeing each other periodically until 1997 when they began living together. Curtis continued to make the payments while they were dating, and ultimately turned over his income to Cynthia when they began living together. On October 15, 2000, Curtis and Cynthia remarried each other. However, on February 2, 2001, Cynthia filed a petition for dissolution of her second marriage to Curtis. In April 2001, Curtis filed a verified petition to revoke maintenance and child support.

....

Examining the factors present in the case at bar it is apparent that the trial court erred by characterizing the periodic payments by Curtis to Cynthia as maintenance. . . . Curtis was to pay to Cynthia \$277,240.00, a sum certain, payable in weekly increments over ten years and one month, a definite period of time. The interest was calculated at five percent per annum and the parties attached an amortization schedule to the agreement. There is no provision for modification based upon future events. In fact, the agreement specifically states that the obligation survives Cynthia's remarriage or death. One of the items awarded to Curtis was Brinkmann Excavating, Inc. That asset alone was valued at \$535,000.00. Therefore, the award to Cynthia of periodic payments totaling \$277,240.00 could not exceed the value of the marital estate at the time of the dissolution. The provisions in the case at bar meet more of the property settlement factors than the spousal maintenance factors.

....

After terminating the periodic payments Curtis was making to Cynthia by characterizing them as spousal maintenance, the trial court further found that Curtis' obligation for that spousal maintenance terminated when they remarried on October 14, 2000. Cynthia claims that regardless of how one characterizes the payments, as spousal maintenance or property settlement, the trial court erred by finding that the obligation automatically was terminated upon Cynthia's remarriage.

. . . [T]he question is whether the parties' subsequent reconciliation automatically terminated the agreement. This is an issue of first impression in Indiana. [2]4A Am.Jur.2d *Divorce and Separation* § 1142 (1998) discusses this topic as follows:

Where the parties execute a true property settlement, as distinguished from a separation agreement, and they thereafter become reconciled and resume cohabitation, one view is that the agreement is not thereby terminated; or, stated another way, reconciliation and resumption of cohabitation do not alone establish the termination of a true property settlement in the absence of the parties' expressed intent that they may do so. (Footnotes omitted).

...

We believe that these references state the proper approach to be used in situations such as in the case at bar. We hold that property settlement agreements are not automatically terminated by the subsequent reconciliation of the parties absent clear proof the parties so agreed or intended.

....

In support of our conclusion we cite the following evidence presented to the trial court. During the hearing on the petition to revoke spousal maintenance and child support, Curtis testified as follows about their post-divorce relationship:

Q: About when in '97 do you . . do you think that you got back together [dating] full time?

A: It was early in the summer.

Q: Okay now had you . . from the time that this divorce decree was entered in October of '95 and the time that you back together in '97, were you making the payments that were laid out in that. . .

A: Yes I was.

Q: Decree? How about after that period of time when you got together full time in 1997, did you continue those payments?

A: I would get delinquent on some payments, but would get caught up again. In my contracting business my money is very sporadic.

Q: So are you saying then that you did stay current, or you might have gotten behind. .

A: I attempted to stay current. .

* * *

Q: Now, during the period of time from '97 when you got back together full time until you married in October of 2000, did you make these . . the payments during that time?

A: Well Cindy set up an account and she had . . she took all of my income in to her account and dispersed it for me. She paid my bills for me and she paid her bills out of that same money.

* * *

Q: And those revenues would go into her personal banking account?

A: Yes.

* * *

Q: And did it continue after that after the remarriage?

A: Sure, absolutely.

* * *

Q: Now, can you say here today that there was an agreement between you two that these payments were not going to need to be formally paid during that period of time?

A: Yeah, we talked about it and I even mentioned one time going back to Court to get it resolved and she became very angry and it was left at that. It was never mentioned again.

[Citation to Transcript omitted.]

From this testimony we can deduce that there was no agreement or intention on Curtis and Cynthia's part to terminate the payments upon their reconciliation. We can only conclude that the payments survived the parties' reconciliation.

. . . The evidence clearly established that the parties neither agreed nor intended for the settlement to terminate; therefore, it survived their reconciliation and remarriage.

* * * *

FRIEDLANDER and SHARPNACK, JJ., concurred.

JUVENILE LAW ISSUE

CLENNA v. MARION COUNTY OFFICE OF FAMILY AND CHILDREN, No. 49A02-0108-JV-521, ___ N.E.2d ___ (Ind. Ct. App. July 2, 2002).

KIRSCH, J.

In this case, Clenna received service by publication of the filing of the petition to terminate his parental rights to A.C. The record before us reflects that after the petition was filed, MCOFC published service to Clenna informing him that an action had been filed to terminate his parental rights to A.C. and that if he failed to appear and answer the allegations in the petition, a default judgment could be entered against him. The notice contained the court name and cause number, the title of the action, and the name and address of MCOFC's attorney. It appeared once in each of three consecutive weeks in a newspaper circulated in Marion County. Thus, MCOFC complied with the service requirements of the Indiana Rules of Procedure.

Presumably because of the great interests at stake in termination proceedings, our legislature has enacted an additional notice requirement in this context. IC 31-35-2-6.5(b) requires the person or entity who filed the petition to terminate the parent-child relationship to send notice of the termination hearing at least ten days prior to the hearing date to a number of interested persons, including the parents. Again, the record reflects that MCOFC sent a letter to Clenna at the address provided to it several weeks prior to the final termination hearing. Thus, the statutory notice requirement for termination hearings has also been met.

Clenna cites *Harris v. Delaware County Div. of Family & Children Servs.*, 732 N.E.2d 248 (Ind. Ct. App. 2000) for the proposition that he was entitled to service of process specifically for the termination hearing. While we acknowledge *Harris*, we

note that in that case, the appellee failed to file a brief. Thus, the court applied the lower standard of “a prima facie showing of reversible error.” *Id.* at 249.

Moreover, *Harris* is factually distinguishable. In *Harris*, the father received notice of the hearing date on the termination petition, but the hearing was continued by the court. The father did not receive notice of the continued hearing, and it was that omission that led to our decision to reverse.

By contrast, here, MCOFC did file a brief, and therefore our normal standard of review applies. Applying that standard to these facts, we hold that the notice given Clenna was adequate. While service of process serves to provide notice of the proceeding, it has a constitutional component and is a prerequisite to jurisdiction. The notice of the hearing which is required by IC 31-35-2-6.5 is a statutory procedural requirement which does not rise to constitutional dimension. Paragraph (b) of the statute provides that the petitioner shall “send notice.” It does not provide for service of process. Trial Rules 4 to 4.17 govern service of process. Rule 5 governs service of subsequent papers and pleadings in the action; Trial Rule 5(B) sets out how service can be accomplished. Trial Rule 5(B)(2) specifically authorizes service by mail.

Here, MCOFC served process of the petition on Clenna. Thus, the trial court had jurisdiction and was constitutionally empowered to act. MCOFC served the notice of hearing upon Clenna’s attorney and sent notice to Clenna at his last known address. Thus, both the statute and the trial rules were satisfied. To the extent that *Harris* seems to require service of process for the fact-finding hearing, we decline to follow it.

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SULLIVAN, J., concurred.

ROBB, J., filed a separate written opinion in which she concurred, in part, as follows:

I reach the same conclusion as does the majority but write separately to explain my disagreement with a portion of the majority’s characterization of Harris v. Delaware County Div. Of Family & Children Servs., 732 N.E.2d 248 (Ind. Ct. App. 2000). I disagree regarding the characterization of *Harris* to the extent the majority implies our decision in that case resulted from our application of a lesser standard of review due to the appellee’s failure to file a brief. Rather, we determined the Delaware County Division failed to give notice to Harris by publication because he was incarcerated at the time, and therefore the County knew exactly where he was. In other words, the decision in *Harris* did not hinge upon the County using an improper method of notice; rather, it turned upon a lack of notice to the father. It was this issue, not the application of a lesser standard of review, that caused our decision to reverse.

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